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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

VAVOULIS & WEINER, LLC, et al., Plaintiffs and Respondents, v. CASTLE & ASSOCIATES, a Professional Law Corporation, Defendant and Appellant.	B213697 (Los Angeles County Super. Ct. No. BC370385)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed. Motion for Award of Sanctions. Denied.

Castle & Associates, Nomi L. Castle, Robert Nida and Robert S. Blonstein for Defendant and Appellant.

Law Offices of Peter L. Tripodes and Peter L. Tripodes for Plaintiffs and Respondents.

In this appeal, defendant Castle & Associates, a Professional Law Corporation (Castle) challenges the sufficiency of the evidence to support the trial court's determinations that (1) the plaintiffs in this case were retained by Castle as expert witnesses for another lawsuit (the underlying case), (2) plaintiffs were not retained by the client that Castle represented in the underlying case, and (3) Castle, not its client, is financially responsible for plaintiffs' expert witness services for the underlying case. The plaintiffs in this case are Vavoulis & Weiner, LLC and The Klabin Company, (Vavoulis & Weiner and Klabin Company, respectively, and together, plaintiffs).

Our review of the appellate record convinces us that the trial court's award of damages and prejudgment interest to plaintiffs is supported by substantial evidence. Therefore, the judgment will be affirmed. Plaintiffs' Motion for Sanctions, however, based on the claims that Castle presented a frivolous appeal will be denied.

FACTUAL AND PROCEDURAL BACKGROUND[1]

1. *Overview of the Case*

In the underlying case, defendant's client Edward Dagermangy (Dagermangy) sued a property owner, Kehiayan, to recover fees for architectural services that Dagermangy rendered for Kehiayan in connection with a construction project. Kehiayan in turn cross-complained against Dagermangy and another architect that also performed services for that construction project, Valli Architectural Group (Valli).

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[1] We recite facts taken from the Reporter's and Clerk's Transcripts. As required by the rules of appellate procedure, we state the facts in the light most favorable to the judgment. (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.)

Robert Blonstein (Blonstein) was the attorney in the Castle law firm who was primarily responsible for handling the underlying case on behalf of Dagermangy.

Valli's attorneys in the underlying case, James Chantland and Kurt Dreibholz, are from the law firm Morris, Polich & Purdy (Morris, Polich). Morris, Polich hired plaintiffs to work on Valli's cross-defense.

Plaintiff Vavoulis & Weiner was hired to provide economic analysis and forensic accounting in connection with Kehiayan's damages claim, and David Weiner did that work. Plaintiff Klabin Company was hired to provide market analysis regarding Kehiayan's damages claim and Kenneth Simpson did that work.

Because the interests of the two cross-defendant architects in the underlying case (Valli and Dagermangy), were aligned, it was agreed that plaintiffs would work on both Valli's and Dagermangy's cross-defenses and plaintiffs' services (fees and costs) would be shared equally in that case.

The instant suit was filed by plaintiffs in order to resolve the question of responsibility for the payment of the fees and costs due to them under the agreement to share plaintiffs' services. Put another way, was plaintiffs' claim payable by defendant Castle or Castle's client, Dagermangy.

Both of the plaintiffs in this case alleged causes of action against Castle for open book account, services rendered—agreed sum, and services rendered—reasonable value. In each of its three causes of action, the plaintiff Vavoulis claimed it was owed $63,429.30 plus interest by Castle. In each of its three causes of action, the plaintiff Klabin claimed it was owed $11,289.03 plus interest by Castle.

The claims were tried to the trial court. The court determined that it was Castle, not Dagermangy who retained plaintiffs' services for the underlying case; and it was Castle, not Dagermangy, that had the obligation to pay the sum claimed by plaintiffs. Judgment was rendered accordingly and thereafter Castle filed this timely appeal.

Castle does not dispute that plaintiffs provided services for Dagermangy's cross-defense. Castle does, however, dispute that plaintiffs proved the elements of their causes of action for open book and/or services rendered. Castle also disputes that plaintiffs proved the amount of the damages awarded by the court.

2. *Trial Testimony in the Instant Case*

a. *The Retainer Agreement Between Defendant Castle and Its Client Architect Dagermangy*

The retainer agreement between Castle and Dagermangy states in part: "We [(Castle & Associates)] will incur various costs and expenses in performing legal services under this Agreement. You agree to pay for all costs, disbursements and expenses paid or owed by you in connection with this matter, or which have been advanced by us on your behalf and which you have not previously paid or reimbursed to us within thirty (30) days of our demand for such payments. [¶] To aid in the preparation or presentation of your case, it may become necessary to hire expert witnesses, consultants or investigators. *We will not hire such persons unless* you agree to pay their fees and charges. *We will select any expert witnesses*, consultants or investigators to be hired. [¶s] All costs, disbursements and litigation expenses associated with this matter, including . . . investigation expenses, consultants' fees,

expert witness fees and other similar items *will be charged at our cost*. You understand that you may be required to make a deposit for costs *before the expenditure is made by Castle & Associates*." (Italics added.)

b. *Plaintiff Klabin Company Agreed to Work on Dagermangy's Defense in the Underlying Case*

Kenneth Simpson testified that his own company, Kenneth L. Simpson, Inc., has a written agreement with the Klabin Company for Simpson to provide expert witness services for Klabin Company. Simpson stated that although initially he was working only on cross-defendant Valli's defense in the underlying case, later his services were also intended for Dagermangy's cross-defense and that came about pursuant to a meeting that Simpson had with the three attorneys representing the cross-defendant architects—Dagermangy's attorney Robert Blonstein from Castle, and Valli's attorneys James Chantland and Kurt Dreibholz from Morris, Polich. The meeting took place at the Morris, Polich office. Simpson stated that at the meeting it was agreed that Simpson/Klabin Company's fees would be split equally between the two law firms—Castle and Morris, Polich. Blonstein told Simpson that Castle would make a payment to him on behalf of Dagermangy. Blonstein said either that he would pay Simpson or "we" would pay Simpson. Blonstein never specified who the check would come from.

Simpson testified that Blonstein knew Simpson would be sending him an engagement letter because they discussed it at that meeting. Simpson's engagement letter was submitted as a joint exhibit at trial in the instant case. It is a November 4, 2005 writing entitled "Terms of Engagement, Explanation of Fees and Billing

Arrangements." The letter states that it is an agreement between Simpson on the one hand and Castle and Morris, Polich on the other. The writing provides in part: "While payment of the initial fee and subsequent billings will be accepted directly from the litigating client and/or insurance company as an accommodation to the law firm, the engagement and full responsibility for payment are the obligations of the law firm." This language follows the paragraph heading "Law Firm Responsibility for Payment." Simpson stated he sent the engagement letter to both law firms.

Simpson expected that the contract/engagement letter would be signed and returned. However, no one from Castle or Morris, Polich signed it and Simpson never got the agreement letter back from either law firm. Nevertheless, Simpson rendered services to the law firms because he "had agreed to work for both firms. We had an agreement when we [(Blonstein, Chantland, Dreibholz and Simpson)] were sitting there in the conference room. I was given materials and I had an assignment, so I followed my word to do my work product."

In the latter part of 2005 attorney Dreibholz at Morris, Polich also sent Blonstein the Simpson engagement letter. Blonstein testified he first saw Simpson's engagement letter sometime in October or November of 2005 but he could not remember from whom he received it. He stated that a short time after he received that engagement letter he informed Dreibholz that "we would not accept this agreement or any agreement." He stated he told Dreibholz that the Castle law firm "has never entered retainer agreements with expert witnesses directly. It's not the firm policy. So we would not have accepted this agreement or any other expert witness agreement. And I'm sure

I made that quite clear to Mr. Dreibholz if not to Mr. Simpson." Blonstein could not recall what Dreibholz said to him. He stated he returned the engagement letter *to Dreibholz* unsigned. Dreibholz did not recall Blonstein telling him that Castle rejected the engagement letter and did not recall ever talking to Blonstein about the terms of the letter. Nor did Dreibholz recall receiving the engagement letter in the mail from Blonstein.

Simpson testified Castle never informed him that it was rejecting his engagement letter or had objections to it. Blonstein recalled having communications with Simpson between the time he received the engagement letter and the end of December 2005, but he could not recall if he told Simpson or the Klabin Company that he would not accept the engagement letter. Between January 1 and February 15, 2006, Blonstein spoke with Simpson but "the issues raised by [Simpson's engagement letter] wouldn't have been discussed. Whether I specifically referenced the agreement, that I don't remember. But issues regarding payment of fees and so forth, that I'm quite sure was discussed in that time period."

Simpson began billing Castle and Morris, Polich for each of the law firms to pay one-half of his charges. With his invoices to Castle, Simpson would include memos to Blonstein asking that Blonstein call him regarding payment. By check dated February 7, 2006, Castle sent a payment to the Klabin Company in the amount of $8,215.72. Typed on the check is the notation "50% share of invoice dated 12/27/05." Although Simpson later sent Castle a request for additional payment, that one check from Castle was the only payment Castle made to Klabin Company. Castle's office told

Simpson a check was going out but Simpson felt he was "getting shined on in getting my payment. And . . . I had called several times, and I thought I was just getting lip service." Then Blonstein told Simpson in April 2006 that Klabin should contact Dagermangy for payment, but Simpson never called Dagermangy to request payment. That was several weeks after Simpson finished his work on the underlying case.

c. *Plaintiff Vavoulis & Weiner Also Provides Services for Dagermangy's Defense in the Underlying Case*

Weiner testified that his firm, Vavoulis & Weiner, was initially retained by Morris, Polich. Then in September or October 2005 attorney Dreibholz from Morris & Polich told Weiner that Vavoulis &Weiner's services would be "shared with the Castle firm, and we were to retroactively split our fees with them." Castle and Blonstein were thereafter being billed directly by Vavoulis & Weiner, and the initial invoices were dated August and September 2005 for work already performed on behalf of Morris, Polich. Blonstein testified he received monthly invoices and periodic statements from Vavoulis & Weiner for several months prior to February 2006 and he would routinely forward them to his client Dagermangy.

An August 29, 2005 engagement letter from Vavoulis & Weiner to Morris, Polich states that the firm would be billed periodically for such services and further stated: "We emphasize that we are being retained by you, and not by your client. We will, therefore, look to you for payment of our invoices and our right to receive payment is not dependent upon your being paid by your client." Dreibholz testified that when he sent the Vavoulis & Weiner engagement letter to Castle, Blonstein never expressed an

objection to him about the letter. Blonstein testified he first saw the Vavoulis & Weiner engagement letter in January or February 2006 and it was sent to him by Dreibholz because there was going to be a telephone conversation with Weiner regarding the amount of the Vavoulis & Weiner bill.

Weiner testified that up until the time the underlying case settled (apparently sometime around mid-February 2006), no one from Castle ever told him that he was sending invoices to the wrong party and instead he should be sending them to Dagermangy because it was Dagermangy and not Castle that was responsible for the Vavoulis & Weiner fees. Not until sometime in March 2006, after Vavoulis & Weiner had finished its services, did Weiner learn that Castle was asserting it was Dagermangy and not Castle who was responsible for paying the Vavoulis & Weiner bill.

After the underlying case settled Weiner called Chantland several times to say that Castle had not paid its share of his fees. Weiner asked Chantland if there was something Chantland could do "to get [Castle] to pay." Chantland called Nomi Castle about the situation and she informed him that Dagermangy was to pay the fees rather than Castle. That was the first time Chantland had heard that. Nomi Castle testified she is the president and sole shareholder in the Castle law firm.

Weiner testified that in the 3000 to 6000 cases in which he has worked as an expert witness, with very little exception the retention of his services has been by a law firm working either for the plaintiff or the defense in a case. In those cases payment for his services would normally come from the law firm although sometimes from an insurance company or someone else. On the rare occasions when it is the law firm's

client that retains his firm, a "much more protective letter" is written, the retainer is much bigger, and the law firm that is representing that client is told that Vavoulis & Weiner will stop working on the case if its bill is not paid. In the underlying case, he had no such agreement with Dagermangy that Dagermangy would be responsible for Vavoulis & Weiner fees.

d. *Other Evidence Regarding Financial Responsibility for Plaintiffs' Services*

In his testimony Blonstein acknowledged he never asked Simpson or Vavoulis & Weiner to stop rendering their services prior to the time the underlying case concluded. Simpson and Vavoulis & Weiner were designated as Dagermangy's retained experts, for trial purposes in the underlying case.

Chantland was asked whether if, during the course of his conversations with Blonstein regarding sharing of expert witness fees Blonstein ever told him that the fee sharing was to be between Dagermangy and Morris, Polich rather than between Castle and Morris, Polich. Chantland answered he did not recall that. In January 2006 Chantland wrote letters to Blonstein asking that "pursuant to our agreement" Blonstein pay a one-half share of the two experts' respective invoices that Morris, Polich had received thus far. Dreibholz testified that during the course of the underlying case he was in very frequent contact with Blonstein regarding, among other things, the experts and their work and the ways in which the underlying case had become more complex.

Weiner testified that trial exhibit 61 is an accurate representation of the services, and the time spent on those services, provided by Vavoulis &Weiner. On February 8,

2006, Chantland complained to Weiner regarding the amount of the Vavoulis &Weiner bill. Despite believing that the amount of time Vavoulis &Weiner spent on the underlying case was warranted, and despite that "everyone had been nothing but complimentary of our work to date," Weiner offered to meet with Chantland and discuss the bill. A conference call was set up in which Weiner, Chantland, Dreibholz and Blonstein participated. Weiner told them he would "unhappily" cut the Vavoulis &Weiner bill in half but he expected to be paid "in short order. And they all said that would happen." He amended the bill to maintain goodwill with his clients and to facilitate payment. Morris, Polich paid its share of the bill in short order but Castle paid no part of its share despite several requests that it do so.

Castle's expert at the trial in the instant case was an attorney, Gerald Knapton. He testified his area of expertise about which he testifies is "ethics, litigation management, reasonableness of fees and costs in litigated matters, and some transactional matters." This includes participation is disputes regarding expert's fees. Castle asked Knapton "to take a look at the custom and practice of retaining experts, as well as the reasonableness of fees and costs by two expert entities."

Knapton stated he is of the opinion that an attorney considering hiring an expert should ask 12 questions. One of those questions is whether the law firm will disclaim any responsibility for the fees of the expert. He stated this is a matter of waiver and estoppel, custom and practice, and if the law firm is silent one thing could be concluded whereas if the law firm states it will not pay the expert's fees that is another thing. He

stated there is a difference between a client's obligation to indemnify his attorney for costs advanced and the obligation of an attorney to a third party vendor to pay for costs.

Knapton did not find anything in the records he reviewed showing that Castle wrote to either Klabin/Simpson or Vavoulis & Weiner saying that those experts should send their invoices to Dagermangy, not to Castle. He also stated that Blonstein never told him, prior to the settlement of the underlying case, that he (Blonstein) told Vavoulis & Weiner and Simpson/Klabin to stop working on the underlying case because he was rejecting the terms of their respective retainer agreements.

Knapton was asked about the quoted provision in the Castle-Dagermangy retainer agreement which we have set out above. Knapton testified this provision means that Castle would not mark up the cost of expert witnesses and Dagermangy had an obligation to reimburse Castle for costs incurred. Nevertheless, he testified that the Castle law firm "was not responsible for the charges by the two experts."

By letter dated January 30, 2006, Blonstein informed Dagermangy of the need for Dagermangy to pay his (Dagermangy's) outstanding balance of $81,815.40 to Castle and to pay "an additional retainer of $120,000." The letter states the latter amount "represents the amount we estimate will be required to pay for our services *and those of the retained experts through the completion of the trial*." The case was set to go to trial on February 21, 2006; however, as noted above, it settled prior to trial.

Dagermangy testified that in response to receiving that January 30, 2006 letter he paid a total of $200,000 to Castle by February 3, 2006 and his understanding was that with those payments he would be covering Castle's services and those of the retained

experts through the completion of trial in the underlying case. Despite the fact that the retainer agreement between Castle and Dagermangy shows that Dagermangy was to pay Castle for expert witnesses and Castle would in turn pay the experts, a week after Blonstein wrote to Dagermangy asking for $200,000 he sent Dagermangy another letter wherein he stated: "As we further discussed last week, [the $200,000] will be insufficient to cover the past outstanding charges owed to the experts, which are presently $61,752.86. You have been receiving billings regularly from each expert . . . and we were previously under the impression you were paying for those bills directly. This turned out not to be the case. We therefore will require an additional $50,000, so that we may pay the past due expert witness bills directly for you, . . ."

On February 14, 2008, Weiner sent Blonstein copies of Vavoulis & Weiner's time sheets. The time sheets begin on August 29, 2005 and run through February 14, 2006. The Klabin Company's times sheets for its work on that case begin on October 24, 2005 and run through January 23, 2006. After the underlying case settled Castle sent Dagermangy the invoices from Vavoulis & Weiner. Dagermangy could not recall being sent such invoices prior to the settlement of the case, and he did not know why Castle was sending them to him after the case settled.

Dagermangy also received letters from Castle wherein Blonstein and Nomi Castle informed Dagermangy that Weiner was going to either sue Dagermangy or send the matter to collections against Dagermangy. That prompted Dagermangy to meet with Weiner for the purpose of providing Weiner with "documents to show that I had paid those fees for his services." Dagermangy spoke with Weiner concerning whether

Vavoulis & Weiner was going to bring a collection suit against him. Dagermangy testified that Weiner said he would not bring such a suit because he (Weiner) "discussed it with Mr. Blonstein, and his agreement was with the firm of Castle." Dagermangy testified he never offered to pay Weiner any money directly because he had already paid Castle money for expert witnesses. Dagermangy stated he was sued in small claims court by a copy service company "for allegedly an unpaid copy bill" but he had never hired a copy service. He appeared in court for the small claims case. Blonstein was also there and Blonstein testified against him. Dagermangy won the small claims case. He also received a demand for payment from a court reporter company, via Castle. He does not know if that bill was paid but he was not sued by the court reporter company.

Dagermangy testified he never entered into an agreement with Vavoulis & Weiner, nor with the Klabin Company, for their respective expert witness services for the underlying case. He had no oral or written agreement whereby he hired either company and agreed to pay their fees. Prior to the time the underlying case settled he never discussed fees with anyone from Vavoulis & Weiner or Klabin Company because "that's why I retained an attorney. I didn't have any agreements with them." He stated he received no invoices from Vavoulis & Weiner, nor from the Klabin Company for payment of their services.

CONTENTIONS ON APPEAL

As noted above, in this appeal Castle argues that plaintiffs did not prove the elements of their causes of action for open book and services rendered, and did not prove the amount of the damages that was awarded by the court.

DISCUSSION

1. *Standard of Review*

Castle correctly states that the standard of review in this appeal is sufficiency of the evidence. Castle has the burden of demonstrating there is no substantial evidence in the record to support the trial court's determinations, including that plaintiffs Klabin Company and Vavoulis & Weiner were retained by Castle and were not retained by Castle's client Dagermangy, and that plaintiffs are owed the amount of money awarded to them in the judgment. In applying that standard of review we focus on evidence that is favorable to plaintiffs. We do not balance favorable evidence against unfavorable evidence. (*Robinson v. Pediatric Affiliates Medical Group, Inc*. (1979) 98 Cal.App.3d 907, 910.) We do not decide credibility of witnesses because that was the job of the trial court in its role of trier of fact. (*People v. French* (1978) 77 Cal.App.3d 511, 523.) If there is substantial evidence, contradicted or uncontradicted, which supports the conclusions reached by the trial court, the judgment will be affirmed. (*Crawford v. Southern Pacific Co*. (1935) 3 Cal.2d 427, 429.)[2]

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[2] "A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.] Sections 632 and 634 [of the Code of Civil Procedure] (both as amended in 1981) set forth the means by which to avoid application of these inferences in favor of the judgment." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

Sections 632 and 634 address cases tried to a court. Section 632 provides for requests for a statement of decision. Section 634 states: "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 675 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue."

2. *Dagermangy's Contractual Arrangement with the Castle Law Firm Demonstrates He Is Not Directly Liable to Plaintiffs for Their Services*

Under the retainer agreement between Castle and Dagermangy, Castle (1) reserved the right to select and hire expert witnesses, (2) agreed to charge

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In its opening brief Castle argues that (1) the judgment in favor of plaintiffs shows that the trial court determined that the evidence establishes there was an open book account between plaintiffs and Castle and/or plaintiffs rendered services to Castle at its request and for its benefit, but (2) the trial court's statement of decision does not specify such determination. Plaintiffs assert that Castle has no grounds for complaining what the statement of decision does or does not specify because Castle only submitted a statement of controverted issues to the trial court in which it requested a statement of decision and thus Castle never complied with section 634.

Castle disagrees. Castle notes that after plaintiffs submitted their proposed statement of decision Castle filed objections to it, and Castle further observes that the trial court's statement of decision is essentially "verbatim to" plaintiffs' proposed statement of decision. Castle argues that in *In re Marriage of Arceneaux*, the court noted that the trial court signed the wife's proposed statement of decision "after making a few modifications," and the court observed that the husband failed to object to either the proposed statement of decision or the trial court's statement of decision and therefore waived the right to complain on appeal of alleged deficiencies in the statement of decision, which in turn "allow[ed] the appellate court to make implied findings in favor of the [wife]." (*In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at p. 1132.) We have two observations regarding this dispute between Castle and plaintiffs as to whether Castle complied with section 634.

First, the statement of decision specifically states that the plaintiffs were retained as expert witnesses by Castle and the plaintiffs were not retained by Dagermangy. That is the equivalent of saying plaintiffs rendered services to Castle at Castle's request. The matter of whether the services were for Castle's benefit addresses the cause of action for the reasonable value of services rendered and that cause of action is discussed *infra*.

Second, Castle acknowledges that the standard of review is the sufficiency of the evidence but Castle has failed to summarize in its opening brief all of the evidence on the issues whether it was retained by plaintiffs and whether the amount of the judgment is warranted. The sufficiency of the evidence standard of review requires an appellant to present to the reviewing court all of the material evidence on the challenged finding, not only the evidence which the appellant believes favors its position. When this rule of appellate practice is not followed the reviewing court is entitled to find that the error of which the appellant complains has been waived. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) Thus, compliance or non-compliance with section 634 is a moot point.

Dagermangy the same amount of money for the expert witnesses that it (Castle) was charged by such witnesses, and (3) reserved the right to require Dagermangy to make a deposit for such witnesses before Castle paid the witnesses. It was a "you pay us and we'll pay them" arrangement. Absolutely nothing in this arrangement shows an intention by Castle that Dagermangy would be directly responsible to the expert witnesses for their fees. Necessarily then, the arrangement contemplates that Castle would be responsible to those witnesses for their fees. Thus, Castle's claim in this suit that plaintiffs should look to Dagermangy for their outstanding fees is at odds with its own agreement with Dagermangy.

3. *There Is Evidence That Castle Agreed with Plaintiffs to Be Financially Responsible to Them, and There Is No Evidence That Dagermangy Agreed with Plaintiffs That He Would Be Financially Responsible for Their Services*

Simpson testified at trial that at the meeting between himself, Blonstein, Chantland and Dreibholz, it was agreed that the cost of Simpson's services as an expert witness would be split equally between Castle and Morris, Polich. Dagermangy was not at that meeting. He took no part in the negotiations and the coming to terms of the agreement. Nor is there evidence that he took part in whatever negotiations and arrangements Castle had with Chantland and Dreibholz to bring Vavoulis & Weiner into Dagermangy's defense and have the cost of its services shared between Castle and Morris, Polich. It is clear that plaintiffs were brought into Dagermangy's defense of the cross-complaint by Castle's request, not Dagermangy's (as was in keeping with the written retainer agreement between Dagermangy and Castle), and there is no evidence

that plaintiffs agreed verbally or in writing to look to Dagermangy for payment for their services if Castle did not pay them.

Moreover, the terms of the retainer letters that Simpson and Vavoulis & Weiner submitted to Castle, whether directly or through Morris, Polich, put Castle on notice that plaintiffs did not intend to look to Dagermangy for the cost of their expert witness services. Even though Castle did not sign those retainer letters and send them on to Simpson and Vavoulis & Weiner, we repeat that it was Castle that brought plaintiffs to Dagermangy's defense and there is no evidence plaintiffs agreed to look to Dagermangy for payment. Moreover, when Castle rejected plaintiffs' respective retainer letters Castle did not inform plaintiffs that plaintiffs should cease work on Dagermangy's defense. Undisclosed intentions on the part of Castle to have Dagermangy be responsible directly to plaintiffs for their services are not enough to relieve Castle of paying plaintiffs. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1172.) Nor is there validity in Castle's assertion that it is not financially responsible for plaintiffs' services because it was merely acting as the agent of a disclosed principal when it sought plaintiffs' services. Nothing in the retainer agreement which Dagermangy signed to secure Castle's services gives even a hint that Castle considered Dagermangy to be in the driver's seat in their relationship.

Several more observations are in order. One, our analysis of how Castle acted and reacted in bringing plaintiffs services to Dagermangy's defense in the underlying case affirms the arrangement that Dagermangy had with Castle—Dagermangy would pay Castle and Castle would pay the experts. Two, when Castle wrote to Dagermangy

on January 30, 2006 it demanded "an additional retainer of $120,000" for Castle's estimate of what would be required to pay for both its services and those of the plaintiffs through the end of trial, thus affirming that Dagermangy would pay Castle and Castle would pay the expert witnesses. Dagermangy sent that $120,000 to Castle. By check dated February 7, 2006, *Castle* sent a payment to the Klabin Company for Simpson's services in the amount of $8,215.72. Typed on the check is the notation "50% share of invoice dated 12/27/05." Castle did not have Dagermangy send his own check for that 50% share. Three, Blonstein testified he received monthly statements/invoices from Simpson for several months prior to February 2006. Assuming the validity of Blonstein's testimony that he would routinely forward those invoices and statements to his client Dagermangy, that is reasonably viewed as Blonstein's informing Dagermangy of the amount of each new charge made by Simpson. Four, Weiner testified that up until the time the underlying case settled, no one from the Castle law firm ever told him that he was sending invoices to the wrong party and instead he should be sending them to Dagermangy because it was Dagermangy and not Castle that was responsible for the Vavoulis & Weiner fees. Five, Castle's own expert witness in the instant case, Gerald Knapton, did not find anything in the records he reviewed that showed Castle wrote to either Klabin/Simpson or Vavoulis & Weiner saying that those experts should send their invoices to Dagermangy, not to Castle. He also stated that Blonstein never told him that, prior to the settlement of the underlying case, he (Blonstein) told Vavoulis & Weiner and Simpson/Klabin to stop working on the underlying case because he was rejecting the terms of their respective retainer agreements.

4. *Substantial Evidence Supports Plaintiffs' Causes of Action*

Clearly there is substantial evidence from which the trial court could find that Castle became indebted to plaintiffs for services they rendered in the underlying case at Castle's request and Castle has failed to fully pay for the services. Common counts state causes of action for payment of money upon contracts implied in fact or contracts implied in law, either in a sum certain or for the reasonable value of goods, services, labor, etc., and will also stand when the contract is an express contract. (*Kawasho Internat., U.S.A., Inc. v. Lakewood Pipe Service, Inc*. (1983) 152 Cal.App.3d 785, 793.) In a cause of action for reasonable value of services (quantum meruit), in addition to proving that it rendered services pursuant to the defendant's express or implied request for the services, the plaintiff must also establish that the services were intended to, and did, benefit the defendant. (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 248-249.)

Here there is evidence of a sum certain owed to plaintiffs—the intent of the plaintiffs to charge a specific amount for fees and to also charge for costs, as evidenced by their retainer letters to which Castle did not indicate any specific objection, coupled with the invoices/statements/time sheets admitted into evidence. Regarding the cause of action for quantum meruit/reasonable value of services, the evidence is clear that Castle sought the services of the plaintiffs and used those services by naming plaintiffs as Dagermangy's expert witnesses for trial; and plaintiffs' services benefitted Castle in that Castle was responsible to Dagermangy to provide a reasonable defense on the cross-complaint in the underlying action. Thus, plaintiffs' services benefitted both

Castle and Dagermangy. Compensation for plaintiffs' services " 'should be paid by the person whose request induced the performance.' " (*Day v. Alta Bates Medical Center*, *supra*, 98 Cal.App.4th at p. 249.) Here, that is Castle.

5. *The Amount Awarded to Plaintiffs Is Supported by Substantial Evidence*

At trial Dreibholz testified he was very satisfied with the services of both plaintiffs. With respect to Castle's view on the quality of plaintiffs' work, one of the attorneys from the Castle law firm told the court: "We don't have an opinion one way or the other on that. We have an opinion that the work was overcharged both by the amount of time that was asserted and the hourly rate and the tasks that were stated in the invoices."

Concerning the rates that were charged by the plaintiffs, those rates were set out in the retention letters that were submitted to Castle. While it is true that no one from Castle signed plaintiffs' respective retention letters, it is also true that Castle did not, in lieu of signing the letters, take up with plaintiffs the matters addressed in those letters. Castle had an obligation to Dagermangy to handle the matter of retention of expert witnesses in a manner that furthered Dagermangy's interests, which would include coming to terms with plaintiffs regarding hourly rates, since Dagermangy would ultimately be financially responsible for plaintiffs' services. Castle received invoices and statements from plaintiffs that had on them the various rates being charged by plaintiffs for various services and Castle never contacted plaintiffs to indicate that such rates were not acceptable and would not be paid. Actions, or in this case, inactions, can

speak louder than words and they can constitute an undisclosed and therefore ineffective intention on Castle's part to not recognize plaintiffs' rates.

The same can be said for Castle's failure to object to the ongoing services that plaintiffs were rendering, that is, the types of services and the time consumed to provide them. Castle received plaintiffs' statements and invoices without comment to plaintiffs.

Regarding Simpson's charges, he devoted a substantial amount of time to the defense of the cross-complaint in the underlying case. He had a lengthy discussion with Dreibholz on October 24, 2005 regarding his assignment and he began working on October 25, 2005. His last assignment was from Chantland and he did that on February 17, 2006. He did not have a specific billing cycle for the underlying case. Rather, as tasks were completed and depositions taken he would send invoices. His own deposition was taken over the course of three days, each session lasting approximately eight hours. Simpson spent about 150 hours on the underlying case. He testified that he prepares his invoices by keeping a running log of his time. He uses a spiral notebook wherein he notes the date, the time frame, the event/service and the minutes spent. When he accumulates time he transfers this information to an "excel spread sheet" and that is the bill. He then throws away the pages from the spiral notebook used to make that bill. The Klabin Company did not prepare his invoices.

In working on the underlying case Simpson provided an "analysis of the economics in the market and the [cross-complainant's] marketing of the property; all aspects of real estate valuation and competitive properties when they were built, when they came on the market; analysis of the econometrics; analysis of demographics;

a . . . whole variety of services." Blonstein testified that Simpson's services expanded as the underlying case progressed. Blonstein stated he did not express any dissatisfaction to the Klabin Company regarding the amount of Simpson's fees. Simpson testified he never received any complaints from Castle regarding the amount of his bills.

As for Vavoulis & Weiner's services, all of its work was completed by the end of January 2006 except for about four hours, which was completed by February 16, 2006. Blonstein stated he received the Vavoulis & Weiner billings each time they "came in" and he "didn't see a problem with the bills" when he received them. It was only after Chantland contacted him and expressed concern about the Vavoulis & Weiner bills that he "saw what Mr. Chantland was talking about." That was after Vavoulis & Weiner had essentially finished their services.

The conversation between Chantland and Blonstein regarding the Vavoulis & Weiner bills occurred on February 8, 2006. Prior to that time neither Blonstein nor Morris, Polich complained about the Vavoulis & Weiner billings. Weiner testified that on February 8 he received an e-mail from Chantland in which Chantland expressed "his frustration with my charges." Weiner "emphatically" disagreed with Chantland's complaints and responded by telling Chantland that he felt "extremely justified that the time we spent was warranted. Everyone had been nothing but complimentary of our work to date, and I would be happy to meet with him." It was on that same day that Weiner, Chantland, Dreibholz and Blonstein had the conference call regarding the Vavoulis & Weiner bill. During the call Chantland admitted he had never looked at the

Vavoulis & Weiner invoices, and Chantland said that had he seen them he would have asked Weiner to limit the scope of his work, but Chantland conceded that Weiner's work kept increasing.

Although he did not want to, Weiner agreed to cut the bill in half in order to maintain good will with Morris and Polich and Blonstein. Also he felt that by cutting the bill he would get paid and his clients would feel better about his work. But Weiner made it clear to the others in the conference call that he expected to be paid in short order and the others said that would happen. Morris and Polich paid their bill in short order but Castle did not. After asking Castle several times to pay the reduced bill Weiner wrote to Castle on April 26, 2006 and stated that if payment was not made by May 15, 2006 the offer to cut the bill in half would be withdrawn. Blonstein acknowledged receiving the letter however no such payment was made and so Castle was sued for the full amount of its one-half share of the Vavoulis & Weiner bill.

Blonstein testified that the underlying case was "actually fairly complex," with Dagermangy suing the defendant in that case for foreclosure on a mechanic's lien and collection for architectural services Dagermangy had rendered to the defendant, the defendant cross-complaining against Dagermangy for breach of contract, professional negligence, breach of fiduciary duty and fraud, and the defendant cross-complaining against the other architect, Valli, on the same causes of action except breach of fiduciary duty. The cross-complainant sought millions of dollars in damages.

Weiner confirmed that the defendant in the underlying case was "very aggressively asserting with some very thick reports from experts that they were out

many millions of dollars. And as the reports came up or the expert depositions were progressing, we were asked to review them, to prepare for them, to research data. It expanded as the full scope of what the [cross-complainants] were claiming evolved." Weiner stated that besides himself there were several people in his firm that worked on the underlying case. All were charged at the same hourly rate of $275 except when the work was data entry, which was charged at $75. Along with the invoices that his firm sent to Castle and Morris, Polich there was "a time detail which breaks out by a fraction of an hour what the individual tasks were that were performed and aggregated up to the ultimate invoice. So the invoice is sort of a summary of all the time multiplied by the hourly rate, and the time sheets were attached to that aggregated by task."

Weiner testified that trial exhibit 61 is an accurate representation of the services and time spent on the services provided by Vavoulis &Weiner. Exhibit 61 contains 10 pages in which are set out the services rendered by Vavoulis & Weiner in the underlying case and the time consumed in performing the services, from August 29, 2005 through February 16, 2006. Asked if he has personal knowledge of the work of all of the individual persons listed in the Vavoulis & Weiner time sheets, Weiner stated he and the others were "working pretty intimately together" and although he was not present "every moment [the others] were working . . . [t]here is some level of faith that they were being honest in their . . . time sheets." He stated it was more than an assumption that the time claimed by the others on the project was correct. He stated he "get[s] very involved in the invoices at the end of every month, and if anything strikes me as unreasonable or concerning, I will adjust it." The peak of his firm's work was in

December 2005 and January 2006 as his deposition and the opposing experts' depositions were going forward. Weiner explained that "[w]e were being sent more and more material, and it became more frenzied." He stated his own deposition took two days and to prepare for it there were "several . . . banker's boxes of material. We performed a tremendous amount of research and analysis, charges, grafts, tabulations of data. It . . . was a piece of art . . . . It was a very, very busy time, . . . "

Dreibholz confirmed that Weiner's work increased in time beyond what was initially anticipated. It was "during the course of several depositions [that] the case became considerably more complex than just a garden variety construction defect." Also the cross-complainant produced "quite a number of financial documents" that "required considerable review," and Weiner helped Dreibholz put together an outline for deposing two of the cross-complainant's expert witnesses. Then when they learned that the damages claimed by the cross-complainant were actually allegedly sustained by a corporation created by the cross-complainant additional work was necessary. Dreibholz consulted very frequently with Blonstein regarding directing work to the plaintiffs as well as other matters.

The trial court was able to examine the various invoices, statements and time sheets submitted by plaintiffs to Castle, along with the testimony from the various witnesses at trial, and determine for itself whether the amounts alleged to be owed to plaintiffs by Castle were in fact owed. The court determined they were. We find no cause to reverse the judgment on the grounds the amounts awarded to plaintiffs were not justified by the evidence.

6. *Sanctions on Claim of Frivolous Appeal Are Not Appropriate In This Case*

Plaintiffs have requested that we impose monetary sanctions against Castle for filing a frivolous appeal. Code of Civil Procedure section 907 provides that a reviewing court may impose "such damages as may be just" on an appellant, in addition to costs on appeal, when a frivolous appeal has been filed.

In *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, our Supreme Court held that "an appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." Regarding the issue of merit in an appeal, the *Flaherty* court warned that this definition of frivolous "must be read to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions."

In our view, this case is not one that calls for the imposition of sanctions. As the Flaherty court made clear, a litigant should be able to try his or her claim or defense without fear that sanctions will be imposed simply because it is rejected by the court as without merit. Here Castle was entitled to argue the viability of its "understanding" of the retainer agreement with its client as well as the credibility of the testimony of its

expert witness. Castle did so and its arguments have been rejected in their entirety. But no reasonable justification for the imposition of sanctions in these circumstances exists.

DISPOSITION

The judgment from which Castle has appealed is affirmed. Plaintiffs shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.